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January 12, 2017

JAN 20 2017

VIA CERTIFIED MAIL

Ms. Randa Coniglio
President/Chief Executive Officer
San Diego Unified Port District
3165 Pacific Highway
San Diego, CA 92101

**Re: Clean Water Act Notice of Intent to Sue/60-Day Notice Letter
San Diego Unified Port District Violations of Clean Water Act, and
NPDES Permit Nos. CAS0109266, CAS000001, and CAS000002**

Dear Ms. Coniglio:

On behalf of the Monsanto Company, Pharmacia LLC, and Solutia, Inc. (collectively, the "Claimants"), we hereby provide notice of the Claimants' intent to sue the San Diego Unified Port District ("Port District") for violations of the Federal Water Pollution Control Act (the "Clean Water Act" or "CWA"), 33 U.S.C. §§ 1251 *et seq.*, National Pollution Discharge Elimination System ("NPDES") Permit No. CAS0109266 ("MS4 NPDES Permit"),¹ NPDES Permit No. CAS000001 ("Industrial NPDES Permit"),² and NPDES Permit No. CAS000002 ("Construction NPDES Permit").³ This letter constitutes a Notice of Violation and Intent to File Suit ("Notice Letter") against the Port District pursuant to Section 505 of the Clean Water Act, 33 U.S.C. § 1365.

The Port District has portrayed itself in public filings as a steward of San Diego Bay ("Bay"), and an innocent observer of discharges of pollutants into the Bay; however, such self-serving characterizations do not withstand scrutiny. Instead, the Port District is one of the largest

¹ NPDES Permit No. CAS0109266, *available at*:

http://www.waterboards.ca.gov/sandiego/water_issues/programs/stormwater/docs/2015-1118_AmendedOrder_R9-2013-0001_COMPLETE.pdf.

² NPDES No. CAS000001, *available at*:

http://www.swrcb.ca.gov/water_issues/programs/stormwater/docs/industrial/2014indgenpermit/wqo2014_0057_dwq_revmar2015.pdf.

³ NPDES Permit No. CAS000002, *available at*:

http://www.waterboards.ca.gov/water_issues/programs/stormwater/docs/constpermits/wqo_2009_0009_complete.pdf.

dischargers of pollutants into the Bay. The environmental impact of the Port District's discharges into the Bay are exacerbated by its repeated inability or unwillingness to supervise the activities of its past and current lessees, resulting in further discharges of pollutants. Far from championing improved water quality in the Bay, the Port District has instead pursued higher rents from its lessees and greater profitability, while at the same time inadequately supervising its lessees and in doing so has failed to prevent extensive discharges of pollutants that it had ample authority to control, had it been so inclined. Notable sources of the Port District's discharges include (1) its inadequate maintenance of sites under its control, (2) its inadequate supervision of lessees, (3), its use of PCB-containing products, (4) its failure to follow best management practices with regard to construction and demolition activities, and (5) its storm water discharges.

In light of the Port District's history of violations, immediate action is needed to achieve long-term compliance with the CWA and to improve the water quality of the Bay. Based on information currently available to the Claimants, the Port District is not complying with the substantive and procedural requirements of the Clean Water Act, the MS4 NPDES Permit, Industrial NPDES Permit, and Construction NPDES Permit (collectively, "NPDES Permits"). Specifically, the Port District has "caused or permitted wastes to be discharged or to be deposited where they [are] discharged into San Diego Bay and created, or threatened to create, a condition of pollution or nuisance"⁴ and is contributing to exceedances of Water Quality Standards ("WQS") in receiving waters by discharging contaminated storm water, non-storm water, and urban runoff from the Port District's Municipal Separate Storm Sewer System ("MS4"), artificial channels, and Port District-controlled lands near the Bay—including the discharge into the Bay of polychlorinated biphenyls ("PCBs") and other pollutants, such as certain metals, bacteria, phosphorous, toxics and their components. Likewise, the Port District has violated the CWA through its discharges without a permit, including through its inadequate maintenance of sites under its control (e.g., Tow Basin, TDY, and airport properties), its inadequate supervision of lessees, and its use of PCB-containing products. Any discharge without an applicable permit, or a violation of the NPDES Permits, constitutes a violation of the CWA and its regulations and is grounds for an enforcement action. *See* 40 C.F.R. § 122.41(a).

Pursuant to Section 505 of the CWA, "any citizen may commence a civil action on his own behalf" against any governmental instrumentality that is "alleged to be in violation of (A) an effluent standard or limitation under [the CWA] or (B) an order issued by the Administrator or a State with respect to such a standard or limitation." 33 U.S.C. § 1365(a). The CWA confers jurisdiction to federal courts to enforce such standards, limitations, and orders, and to apply appropriate civil penalties under 33 U.S.C. Sections 1319(d) and 1365(a). Further, "nothing in the Act limits citizen suits to only those claims where the alleged polluter has obtained an NPDES permit and violated its terms. Suit may also be brought where a party proceeds to discharge pollutants from a point source without a required permit." *See, e.g., Ass'n to Protect Hammersley, Eld, and Totten Inlets v. Taylor Res., Inc.*, 299 F.3d 1007, 1012 n.4 (9th Cir. 2002) (internal citation omitted).

⁴ Ex. 1, Regional Board Technical Report for Cleanup and Abatement Order R9-2012-0024, Finding 11.

Section 505(b) of the CWA, 33 U.S.C. § 1365(b), requires a citizen to give notice of the alleged violations and his or her intent to sue 60 days prior to the initiation of a civil action under Section 505(a) of the CWA, 33 U.S.C. § 1365(a). The Port District is formally placed on notice that following 60 days from the date of this Notice Letter, the Claimants intend to amend their counterclaims against the Port District in the Action⁵ to include citizen enforcement claims under the CWA. Notice is also being given to the Chief Administrative Officer of the water pollution control agency for the State in which the violation is alleged to have occurred, the Administrator of the United States Environmental Protection Agency (“EPA”), and the Regional Administrator of the EPA for the State in which the violations are alleged to have occurred. 40 C.F.R. § 135.2(a).

I. FACTUAL BACKGROUND

A. The Port District’s Storm Sewer System

The Port District is a public benefit corporation, created in 1962 by the San Diego Unified Port District Act, California Harbors and Navigation Code Appendix I, in order to manage San Diego Harbor and administer certain public lands along the Bay. The Port District manages as trustee of state-owned land approximately one-third of the tidelands and submerged lands of the Bay (including the airport, from approximately 1962 until 2002).

The Port District also owns and operates an MS4 through which it discharges waste commonly found in urban runoff into the Bay subject to the terms and conditions of the NPDES Permits, and it is responsible as co-permittee for over 200 discrete storm drain outfalls discharging to the Bay⁶ (Order No. R9-2013-0001, as amended by Order No. R9-2015-0001, NPDES No. CAS0109266; Order No. 2014-0057-DWQ, NPDES No. CAS000001; Order No. 2009-0009-DWQ, NPDES No. CAS000002). The Port District has discharged urban storm water and non-storm water containing pollutants directly or indirectly to the Bay, which includes metals (aluminum, arsenic, cadmium, chromium, copper, lead, mercury, nickel, iron, silver, and

⁵ On March 13, 2015, the Port District filed against the Claimants a federal lawsuit in the Southern District of California, captioned *San Diego Unified Port District v. Monsanto, et al.*, Case No. 15-cv-0578 JAH NLS (S.D. Cal. Filed Mar. 13, 2015) (the “Action”). The presence of pollutants in the storm water and wastewater discharged by the Port District and its tenants into the Bay in violation of the Port District’s CWA permits is a substantial cause of the Port District’s suit against the Claimants, as well as a consolidated suit by the City of San Diego. As a result, the Claimants have been and are being injured, including through the incurrence of costs for which the Port District’s violations of the CWA are a substantial cause. Thus, the interests of the Claimants have been, are being, and will continue to be adversely affected by the Port District’s failure to comply with its CWA permits and to obtain permits for its unauthorized discharges from non-permitted point sources.

⁶ See Ex. 1, Regional Board Technical Report for Cleanup and Abatement Order R9-2012-0024, Finding 11; San Diego Unified Port District, *Stormwater Management Program*, <https://www.portofsandiego.org/environment/stormwater/302-stormwater-management-program.html>; Ex. 2, Port District Jurisdictional Runoff Management Program 2015 Annual Report, at 1.2, Appendix F.

zinc), total suspended solids, sediment (due to anthropogenic activities), petroleum products, and synthetic organics (pesticides, herbicides, and PCBs).⁷

The Port District operates an MS4 conveyance system through which it discharges urban runoff into the Bay.⁸ “The Port District’s MS4 conveys urban runoff from the urbanized and largely industrial tidelands area storm drain structures and storm drain pipes that discharge into the . . . Bay.”⁹ The urban storm water containing waste that has discharged from the MS4 has contributed to the accumulation of pollutants in the Bay. The Port District has also allowed non-storm water to discharge from construction and demolition sites from properties adjacent to the Bay that contained pollutants, and unpermitted discharges from abandoned tenant sites and releases that should be subject to a permit.

Urban runoff is a waste, as defined in the Water Code, which contains pollutants and adversely affects the quality of the waters of the State.¹⁰ The discharge of urban runoff from an MS4 conveyance is a “discharge of pollutants from a point source” into waters of the United States as defined in the Clean Water Act.¹¹ Construction and demolition sites that discharge pollution runoff into the Bay through artificial channels, including artificially graded building sites, are “point sources” under the CWA.¹² Urban runoff discharges from the Port District are regulated under NPDES requirements prescribed by California’s State Water Resources Control Board (“State Water Board”) and the San Diego Regional Water Quality Control Board (“Regional Board”) pursuant to CWA Section 402 and Water Code Section 13376. The Port District must comply with all conditions of the NPDES requirements. Any noncompliance with NPDES requirements constitutes a violation of the CWA and Water Code.

⁷ Ex. 1, Regional Board Technical Report for Cleanup and Abatement Order R9-2012-0024, Finding 11; Ex. 3, Cruise Ship Terminal Level 1 Exceedance Response Action Report, *prepared by Geosyntec consultants, prepared for Port District*, at 1 (Dec. 2016).

⁸ Ex. 1, Regional Board Technical Report for Cleanup and Abatement Order R9-2012-0024, Finding 11.

⁹ *Id.*

¹⁰ See Wat. Code, § 13050, subd. (d). Waste includes sewage and any and all other waste substances, liquid, solid, gaseous, or radioactive, associated with human habitation, or of human or animal origin, or from any producing, manufacturing, or processing operation, including waste placed within containers of whatever nature prior to, and for purposes of, disposal.

¹¹ 40 CFR § 122.2 defines “point source” as “any discernable, confined, and discrete conveyance, including but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, landfill leachate collection system, vessel or other floating craft from which pollutants are or may be discharged. This term does not include return flows from irrigated agriculture or agriculture storm water runoff.” 40 CFR § 122.2 defines “discharge of a pollutant” as “[a]ny addition of any ‘pollutant’ or combination of pollutants to ‘waters of the United States’ from any point source.”

¹² See *San Francisco Herring Ass’n v. Pac. Gas & Elec. Co.*, 81 F. Supp. 3d 847, 852 (N.D. Cal. 2015).

The Port District is responsible for collecting, managing and treating storm water and wastewater generated throughout its tidelands. The federal government has recognized that discharges from municipal sewer systems, such as the Port District's MS4, are major sources of water contamination; thus, it requires regional and local governments to obtain NPDES permits for those discharges. The State of California, pursuant to its permitting authority under the CWA, has authorized the Regional Board to regulate the discharge of pollutants into waters of the United States. On May 8, 2013, the Regional Board adopted the current MS4 NPDES Permit as the NPDES permit for the discharge of storm water from storm sewer systems in the Bay. That permit became effective June 27, 2013, and has been subject to amendments, most recently on January 7, 2016. The MS4 NPDES Permit covers MS4 discharges into the Bay, and the Port District is a co-permittee under that permit. *See* MS4 NPDES Permit Table B-1.

Additionally, on April 1, 2014 the State Water Board adopted the General Permit for Storm Water Discharges Associated with Industrial Activities (Industrial NPDES Permit) and on September 2, 2009 adopted the General Permit for Storm Water Discharges Associated with Construction and Land Disturbance Activities (Construction NPDES Permit) to regulate storm-water and non-storm water discharges from industrial facilities and construction and/or demolition sites. The Port District's Cruise Ship Terminal is an industrial site regulated by the Industrial NPDES Permit.¹³ Many of the Port District's and its tenants' past and present construction and demolition projects have been regulated by the Construction NPDES Permit.¹⁴

Apart from adhering its own Permits, the Port District also has the authority to require tenants to inspect, identify and remove PCB-containing materials prior to construction, demolition and renovation activities on property it holds in trust, yet fails to do so, to the detriment of water quality in the Bay. Worse, the Port District, itself, upon information and belief, continues to use, and allow its tenants to use, PCB-containing products—including in applications that ultimately contribute to PCB contamination in the Bay. The resulting unpermitted discharges also constitute separate and distinct violations of the Clean Water Act. *See, e.g., Ass'n to Protect Hammersley, Eld, and Totten Inlets*, 299 F.3d at 1012.

Impacts of Urban Storm Water in the Bay

Storm water is a significant contributor to Bay pollution. Storm water carries oil and dirt from vehicles and roads, pollutants from industrial facilities, silt and sediment from construction projects and natural erosion, wild and domestic animal feces, and chemicals from asphalt, concrete, lawns, roofs, buildings and every other object that is out in the rain. These chemicals and other pollutants are washed into the storm drain system, which discharges directly to the Bay.

¹³ Ex. 4, Receipt Letter from State Water Board to Port District, accessible through <https://smarts.waterboards.ca.gov/smarts/faces/PublicDataAccess/PublicNoiSearch.xhtml> (confirming that the Cruise Ship Terminal is regulated by the Industrial NPDES Permit).

¹⁴ *See, e.g.* Ex. 5, San Diego Marriott Construction Stormwater Pollution Prevention Plan, available at <https://www.portofsandiego.org/san-diego-marriott-marquis-marina/documents/draft-eir-1/3557-10-draft-eir-appendix-f2-construction-swppp/file.html>.

One of the adverse conditions caused by storm water discharges that has recently received attention, and which is the subject of the Port District's Action, is PCB discharges. PCBs are industrial compounds that were manufactured by multiple producers in the U.S. and internationally as components of other products and continue to be manufactured inadvertently today as part of chemical processes. PCBs were used in heavy industrial machinery, and continue to be used legally in certain applications. Historically, PCBs were used in various applications, including lubricants, insulating oils, marine paints, building paints, electrical equipment, caulking and sealant materials.

II. STATUTORY BACKGROUND

A. The Clean Water Act

In 1972, Congress amended the Federal Water Pollution Control Act of 1948 to remedy the historically unchecked degradation of the nation's waters. Congress set forth the CWA's primary objective to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a); *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992). The introductory sections of the CWA established the ambitious goal of eliminating the discharge of pollutants into navigable waters by 1985, and an interim goal of achieving fishable and swimmable conditions, wherever possible, by 1983. 33 U.S.C. §§ 1251(a)(1)-(2). Congress amended the Clean Water Act in 1987 to make clear that storm water runoff was a national concern and was to be regulated by the CWA. *See* 33 U.S.C. § 1342.

The Clean Water Act specifically prohibits the discharge of any pollutant by any person except in compliance with enumerated sections of the CWA. 33 U.S.C. § 1311(a). As such, the discharge of pollutants into waters of the United States is allowed only pursuant to an NPDES permit issued by the EPA or by an EPA-delegated State-permitting authority, such as the Regional Board. *Id.* (There is no dispute that the Bay is a "water of the United States" within the meaning of the CWA.)

Section 402(p) of the CWA establishes a framework for regulating municipal storm water discharges under the NPDES scheme. 33 U.S.C. § 1342(p). NPDES permits issued for discharges from municipal storm sewers "require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator . . . determines appropriate for the control of such pollutants." *Id.*; *see also* 40 C.F.R. § 122.44(d)(1); *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1166 (9th Cir. 1999) ("EPA has the authority to determine that ensuring strict compliance with State WQS is necessary to control pollutants.")

The Regional Board issued the MS4 NPDES Permit, Industrial NPDES Permit, and Construction NPDES Permit pursuant to Section 402(p) of the CWA, and any violation of the NPDES Permits constitutes a violation of the CWA and its regulations. 33 U.S.C. § 1311(a); 33 U.S.C. § 1342(p); 40 C.F.R. § 122.41(a). The Port District allows other discharges into the Bay without a required permit, which constitutes a separate violation of the CWA and its regulations. *Id.*

B. Surface Water Criteria

Section 303(d) of the CWA, 33 U.S.C. § 1313(d), requires the State to identify surface waters that do not meet applicable WQS even after the applications of the technology-based effluent limitations required by Sections 301(b) and 306 of the CWA. All EPA-delegated States, including California, are required under CWA Section 303(d) and federal regulation, 40 C.F.R. § 130.0, to prepare a list of and set priorities for water quality limited segments (also referred to as “impaired water bodies”). California’s CWA Section 303(d) list of impaired waterbodies includes the Bay and several sections of its shoreline. The Bay is listed as impaired for PCBs, PAHs, benthic community effects, enterococcus, fecal coliform, total coliform, sediment toxicity, chlordane, indicator bacteria, and various metals (including zinc, mercury and copper)—all pollutants commonly found in storm water runoff discharged by the Port District.

The Clean Water Act also requires that the delegated State permitting authority ensure compliance with WQS in NPDES permits. *See* 33 U.S.C. § 1313(a). WQS are comprised of Designated Uses of the water body (*e.g.*, water contact recreation or municipal drinking water), and the State water quality criteria or standards that must be met to maintain the Designated Use. 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. § 131.3(i). Water quality criteria may be expressed numerically or with narrative descriptions of the required quality of water to support the Designated Use.¹⁵ 40 C.F.R. § 131.3(b).

The Designated Uses of the Bay are industrial service supply, navigation, contact water recreation, non-contact water recreation, commercial and sport fishing, preservation of biological habitats of special significance, estuarine habitat, wildlife habitat, marine habitat, migration of aquatic organisms, spawning, reproduction, and/or early development, shellfish harvesting, and rare, threatened, or endangered species.¹⁶ The Designated Uses of the Bay are threatened or impaired by the continued discharge of contaminated storm water and non-storm water from artificial channels and the Port District’s MS4.

C. The Regional Board’s MS4 NPDES Permit

The MS4 NPDES Permit authorizes the discharge of storm water to surface waters and to ground waters of the State from municipal sewer systems owned or operated by each co-permittee covered under the MS4 NPDES Permit. As the owner and operator of a regulated MS4 in San Diego, the Port District is a designated co-permittee. MS4 NPDES Permit, Table 1a. Section II.A.1 of the MS4 NPDES Permit prohibits the discharge from MS4s that would cause or threaten to cause pollution, contamination, or nuisance in waters of the State. Section II.A.2 of the MS4 NPDES Permit prohibits any discharge from the MS4 that would cause or contribute to the violation of a WQS in any receiving waters of the State. Each co-permittee is also required

¹⁵ The San Diego Region’s Surface Water Criteria is available at http://www.waterboards.ca.gov/sandiego/water_issues/programs/basin_plan/.

¹⁶ San Diego Regional Water Quality Control Board, Water Quality Control Plan for the San Diego Basin, at Table 2-3 (as amended on May 17, 2016) (identifying beneficial uses of San Diego Bay), *available at* http://www.waterboards.ca.gov/rwqcb9/water_issues/programs/basin_plan/docs/update082812/C_hpt_2_2012.pdf.

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to reduce pollutants in discharges to the maximum extent practicable (“MEP”). MS4 NPDES Permit § II.A.3.

The Claimants are informed and believe that the Port District has known since at least 2012, when the Regional Board named the Port District as a “discharger” at the Shipyard Sediment Site, that storm water discharges containing pollutants from the MS4 have caused or contributed to violations of WQS. The Claimants are also informed and believe, based on co-permittee discharge reporting, that the Port has known that storm water discharges from its MS4 have caused or contributed to violations of WQS for other pollutants.

D. The State Water Board’s Industrial NPDES Permit

The Industrial NPDES Permit authorizes and regulates discharges of industrial storm water and non-storm water discharges to waters of the State from facilities designated by the Regional Board. As the owner and operator of the Cruise Ship Terminal in San Diego, the Regional Board has recognized the Port District as a permittee. Section III.C of the Industrial NPDES Permit prohibits industrial storm water discharges that “contain pollutants that cause or threaten to cause pollution, contamination, or nuisance.” Section III.F. of the Industrial NPDES Permit prohibits discharges that contain hazardous substances in excess of reportable quantities established in 40 C.F.R. Sections 110.6, 117.21, or 302.6.

The Claimants are informed and believe, based on the Port District’s annual reporting, that the Port District discharges storm water containing PCBs and other chemicals from the MS4 causing or contributing to violations of WQS.¹⁷ During the 2015-2016 reporting year, the Port District submitted reports to the State Water Board indicating samples taken from the Cruise Ship Terminal showed elevated levels of iron, copper, lead, zinc, aluminum, and total suspended solids:¹⁸

2015-2016 Cruise Ship Terminal Sampling Results		
Constituent	Reporting Limit	Sample Result
Aluminum	0.0500 mg/L	0.400 to 2.25 mg/L
Copper	0.00100 mg/L	0.0212 to 0.217 mg/L
Iron	0.100 mg/L	0.611 to 3.93 mg/L
Lead	0.00100 mg/L	0.00232 to 0.0158 mg/L
Total Suspended Solids	1.0 mg/L	18 to 272 mg/L
Zinc	0.00500 mg/L	0.0148 to 0.561 mg/L

¹⁷ See Ex. 3, Cruise Ship Terminal Level 1 Exceedance Response Action Report, *prepared by* Geosyntec consultants, *prepared for* Port District, at 1 (Dec. 2016) (reporting discharges in excess of annual Numeric Action Level allowances for total suspended solids, aluminum, copper, and iron).

¹⁸ *Id.* The Port District submitted Eurofins Calscience Work Order Numbers 15-09-1270, 15-12-1659, 16-01-0327, and 16-03-0481 to the State Water Board, showing these samples.

E. The State Water Board's Construction NPDES Permit

The Construction NPDES Permit regulates discharges of pollutants in storm water associated with construction activity to waters of the State from construction sites that disturb one or more acres of land surface. The Port District and many of its tenants are currently or have been subject to the Construction NPDES Permit.¹⁹ Section III.C of the Construction NPDES Permit prohibits discharges that cause or contribute to a violation of any water quality standard or that contain toxic constituents in toxic amounts or other significant quantities of pollutants. In addition, Section I.E. of the Construction NPDES Permit prohibits all discharges which contain a hazardous substance in excess of reportable quantities established in 40 C.F.R. Sections 117.3 and 302.4, unless a separate NPDES Permit has been issued to regulate those discharges, and Section III.C.1 further prohibits any non-storm water discharges that “cause or contribute to a violation of any water quality standard.”

The Claimants are informed and believe, based on the Port District's annual reporting, that the Port District has known that it fails to implement Best Management Practices (“BMPs”) and prevent polluted storm water and non-storm water discharges into the Bay, causing or contributing to violations of WQS for pollutants.²⁰

III. VIOLATIONS OF THE CLEAN WATER ACT AND SPECIFIC NPDES PERMITS REQUIREMENTS

A. Violations of CWA, 33 U.S.C. §§ 1311 & 1342, MS4 NPDES Permit, § II.A.1, Industrial NPDES Permit, §§ III.C & III.F

Information currently available to the Claimants indicates that the Port District has and continues to violate MS4 NPDES Permit, Section II.A.1 and Industrial NPDES Permit, Sections III.C and III.F by discharging storm water pollutants from the MS4 in a way that causes or threatens to cause a condition of pollution, contamination, or nuisance in the waters of the State. The Port District does not comply with this standard.

The Porter-Cologne Water Quality Act defines “pollution” as “an alteration of the quality of the waters of the state by waste to a degree which unreasonably affects . . . the waters for beneficial uses.”²¹ “Contamination” is defined as “an impairment of the quality of the waters of the state by waste to a degree which creates a hazard to the public health through poisoning or

¹⁹ See, e.g. Ex. 6, San Diego Unified Port District, Notice of Intent; Ex. 7, San Diego Marriott Marquis & Marina Notice of Intent; Ex. 8, San Diego Marriott Marquis & Marina Construction Stormwater Pollution Prevention Plan, available at <https://www.portofsandiego.org/san-diego-marriott-marquis-marina/documents/draft-eir-1/3557-10-draft-eir-appendix-f2-construction-swppp/file.html>. Additional permit documents for the Port District and its tenants may be accessed at: <https://smarts.waterboards.ca.gov/smarts/faces/SwSmartsLogin.xhtml>.

²⁰ See Ex. 8, 2012-2013 Port District Jurisdictional Urban Runoff Management Program Annual Report, Table 3-2.

²¹ Wat. Code, § 13050, subd. (l)(1).

through the spread of disease. 'Contamination' includes any equivalent effect resulting from the disposal of waste, whether or not waters of the state are affected."²²

Pollutants conveyed and discharged by the MS4 conveyance include metals, TSS, sediment, petroleum products, pesticides, herbicides, and PCBs. These same pollutants in the discharges have accumulated in the Bay sediment that adversely affects the beneficial uses of the Bay, violating the MS4 NPDES Permit and Industrial NPDES Permit.

According to the Port District's July 7, 2016 annual report submitted pursuant to the Industrial NPDES Permit, the Port District discharges storm water containing total suspended solids, aluminum, copper, and iron from its Cruise Ship Terminal in excess of the Numeric Action Level allowances.²³

Additionally, and as set forth below on pages 13-16, upon information and belief, the Port District and various past and current tenants, with Port District knowledge and concurrence, purchase, use, and dispose of PCB-containing products in a manner that has resulted in discharges into the Bay via storm water runoff.²⁴ On information and belief, the Port District also inadequately prevents the spread of PCBs and requires no pre-demolition or pre-renovation inspection, identification, and removal of PCB-containing materials before release and discharge. Upon information and belief, the Port District's and certain tenants' buildings are built with caulk and paint containing PCBs.²⁵ On information and belief, the Port District has the authority as trustee, but does not inspect or identify these PCB-containing materials as part of its inspections or building permits and does not take proper precautions to prevent the spread of contaminated dust and materials from construction, demolition and renovation activities on Port District-controlled properties.²⁶

²² *Id.* subd. (k).

²³ See Ex. 3, Cruise Ship Terminal Level 1 Exceedance Response Action Report, *prepared by* Geosyntec consultants, *prepared for* Port District, at 1 (Dec. 2016).

²⁴ The State of Washington has recently found PCBs in hundreds of consumer products, such as caulks, road paints, plastics, pesticides, office products, and printed material. See Ex. 9, State of Washington Department of Ecology, Polychlorinated Biphenyls in Consumer Products, Pub. No. 16-04-014 (Nov. 2016), at 1, 13.

²⁵ The City of Spokane recently ordered a study which identified fixed building sources such as building sealants and caulks as "one of the largest source areas of PCBs in the Spokane watershed. Building demolition and renovation activities provide the potential to mobilize these fixed PCBs, making them more amenable to transport." Ex. 10, Spokane River Regional Toxics Task Force, Comprehensive Plan to Reduce Polychlorinated Biphenyls (PCBs) in the Spokane River (Nov. 29, 2016).

²⁶ See Ex. 11, Port District Construction Stormwater Pollution Prevention Plan Form, *available at* <https://www.portofsandiego.org/document/environment/stormwater-management/swppp/7028-construction-swppp-1-acre-port-template-pdf/file.html>.

Considering the above, the Port District has taken inadequate affirmative steps to eliminate the discharge of pollutants in storm water, in violation of Section II.A.1 of the MS4 NPDES Permit, and the CWA, including because certain of such discharges are occurring without a permit. These violations are ongoing and will continue in the future. Every day that polluted storm water enters the Port District's MS4 in violation of the MS4 NPDES Permit is a separate and distinct violation of CWA § 301, 33 U.S.C. § 1311. Pursuant to Section 309(d) of the Clean Water Act, the Port District is subject to penalties for all violations of the MS4 NPDES Permit and the CWA occurring within the past five years. 33 U.S.C. § 1319(d).

B. Violations of CWA, 33 U.S.C. §§ 1311 & 1342, MS4 NPDES Permit, § II.A.2, and Construction NPDES Permit, § III.C

Section II.A.2 of the MS4 NPDES Permit and Section III.C of the Construction NPDES Permit mandates that the Port District cannot violate any WQS. The Port District does not comply with this standard and is thus committing ongoing violations of the MS4 NPDES Permit Section II.A.2 and the Construction NPDES Permit Section III.C.

The San Diego region's WQS water quality objectives are designed to protect the existing and potential beneficial uses and to regulate, among other things, the amount of toxic substances that may be legally discharged into surface waters. The Water Quality Control Plan for the San Diego Basin states that "[a]ll waters shall be maintained free of toxic substances in concentrations that are toxic to, or that produce detrimental physiological responses in human, plant, animal, or aquatic life." Upon information and belief, during construction, renovation and demolition activities, the Port District and/or certain of its tenants have allowed non-storm water and storm water discharges by not properly developing and implementing BMPs that inspect, identify, and remove PCBs prior to construction, renovation, and demolition.

While the Port District purports to have recently implemented some BMPs at construction sites, it admits over 10% of the time that the Port District still fails to prevent discharges from materials and wastes into the storm drain system, to provide storm drain inlet sediment protection, or keep waste containers overflowing at construction sites.²⁷ In addition, during construction and demolition, the Port District has allowed contaminated water and sediments to flow from construction sites into the Bay in non-storm water discharges. Such discharges have occurred due to broken waterlines and other accidents, as well as from discharges through artificial channels. During the demolition of the South Campus in Chula Vista, for example, the Port District reported to the Regional Board un-permitted non-storm water discharges due to a deficiency in its BMPs. Sampling data showed discharges in excess of reporting limits for many metals, including aluminum, arsenic, chromium, cobalt, copper, iron, mercury, nickel, lead, and zinc. These samples did not analyze or test for PCBs, or other

²⁷ Ex. 8, 2012-2013 Port District Jurisdictional Urban Runoff Management Program Annual Report, Table 3-2.

pollutants.²⁸ Demolition and renovation of buildings and their components and equipment are a known, documented, significant source of PCBs into adjoining water bodies.²⁹

Similarly, the State Water Board recently sent a Notice of Violation to the San Diego Marriott Marquis & Marina, a Port District tenant, for (among many violations) (1) failing to comply with discharge prohibitions by allowing “sediment laden non-storm water” to discharge into the Bay and the MS4 system; (2) failing to implement “erosion controls, perimeter sediment controls, and run-on and runoff controls,” which led to non-storm water discharges from the site; and (3) failing to adequately design a Storm Water Pollution Prevention Plan (SWPPP) (a plan the Port District approved).³⁰ Upon information and belief, non-existent or failed BMPs have allowed sediment to flow from construction sites into the Bay through artificial channels and through the Port District’s MS4.³¹ By failing to prevent storm water and non-storm water runoff from discharging into the Bay, the Port District is in violation of the Water Quality Control Plan for the San Diego Basin and consequently in violation of the MS4 NPDES Permit Section II.A.2 and Construction NPDES Permit Section III.C.

By allowing the discharge of polluted storm water into the MS4, which directly discharges into the Bay in violation of California State Surface WQS, the Port District is violating its Permits and the CWA. The Port District has taken inadequate affirmative steps to eliminate these violations; thus, these violations are ongoing and will continue in the future. Every day that polluted storm water enters the Port District’s MS4 is a separate and distinct violation of Clean Water Act Section 301, 33 U.S.C. § 1311, the MS4 NPDES Permit Section II.A.2, and the Construction NPDES Permit Section III.C. These violations will continue each day that discharges of polluted storm water enter the Bay in violation of the requirements of the CWA and the NPDES Permits. The Claimants will include additional

²⁸ See Ex. 12, Apr. 1, 2014 South Campus Partial Demo Phase 4A BMP Inspection Report available at <https://smarts.waterboards.ca.gov/smarts/faces/SwSmartsLogin.xhtml>. The report states that during an inspection, non-storm water discharges were coming from the corner of a construction site. Samples of the discharge were taken and analyzed (though not for PCBs) and the results showed elevated levels of aluminum, arsenic, barium, beryllium, cadmium, chromium, cobalt, copper, mercury, molybdenum, nickel, lead, and zinc in the discharge.

²⁹ Ex. 10, Spokane River Regional Toxics Task Force, Comprehensive Plan to Reduce Polychlorinated Biphenyls (PCBs) in the Spokane River, at 61-62, A-13 (Nov. 29, 2016) (noting that fixed building sources are a significant source of PCBs, and that “[b]uilding demolition and renovation activities provide the potential to mobilize these fixed PCBs, making them more amenable to transport to [nearby water bodies]”). The report also references studies conducted in California that have reached similar conclusions. *Id.*, at 61 (citing reports by the San Francisco Bay Estuary Institute and the San Francisco Estuary Project).

³⁰ See Ex. 13, May 29, 2015 Notice of Violation. See footnote 26 for the Port District approved SWPPP.

³¹ *Id.*; Ex. 14, July 20, 2015 Unauthorized Discharge Memorandum. After the State Water Board issued the Notice of Violation, the Port District’s tenant reported an additional violation when a waterline broke, resulting in further unauthorized non-storm water discharges into the Bay.

violations when additional information becomes available. The Port District is subject to penalties for all violations of the Clean Water Act occurring in the past five years.

C. Violations of CWA, 33 U.S.C. §§ 1311 & 1342, Discharges Without A NPDES Permit

The CWA prohibits discharges of pollutants into the waters of the United States from point sources. *See, e.g., San Francisco Herring Ass'n v. Pac. Gas & Elec. Co.*, 81 F. Supp. 3d 847, 860 (N.D. Cal. 2016). “The statutory definition of a point source is meant to be ‘extremely broad.’” *Id.* at 862 (citation omitted). It includes “any discernable, confined, and discrete conveyance, including but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, [or] container, ... from which pollutants are or may be discharged.” 40 C.F.R. § 122.2.

PCBs were used as paints and sealants, such as caulks between the 1950s and 1970s.³² Many buildings constructed during that time may still contain caulks and paints with elevated levels of PCBs. Available data in comparable water bodies show fixed building sources have been identified as one of the largest sources of PCBs in water bodies.³³ Building renovation and demolition activities, when conducted without proper prior inspections and precautions, can mobilize these PCBs and result in discharges to water bodies.³⁴ The Port District has the authority to control the construction, demolition, and renovation activities on its trust property, including the authority to inspect and require the inspection, identification, and removal of PCB-containing products before the demolition and renovation of buildings located on the Port District’s tidelands.³⁵ PCB releases during construction, demolition and renovation activities are a known and significant source of ongoing PCB impacts into adjoining water bodies.³⁶ The Port has had, at all relevant times, the obligation and ability under its lease agreements to impose controls that could prevent or reduce such discharges, but it failed to do so, as the Regional Board has acknowledged in Cleanup and Abatement Orders, such as Investigative Order No. R9-2014-0007 and CAO No. R9-2012-0024. Upon information and belief, the Port District has known of PCB-containing materials located on its trust property and yet has failed, and continues

³² *See* Ex. 15, Diamond, M.A., L. Melymuk, S.A. Csiszar, and M. Robson, 2010, *Estimation of PCB Stocks, Emissions and Urban Fate: Will our Policies Reduce Concentrations and Exposure?*, 44 *Envtl. Sci. Tech.*, 2777-83 (2010).

³³ *See* Ex. 16, Klosterhaus, S.D. Yee, A. Wong, L. McKee, 2011, *PCBs in Caulk Project: Polychlorinated Biphenyls in Sealants in San Francisco Bay Area Buildings: Estimated Stock in Currently Standing Buildings and Releases to Stormwater during Renovation and Demolition*, Oct. 2011; *see also supra* n. 29.

³⁴ The U.S. EPA recommends testing for PCBs in caulk and other building materials prior to demolition/removal to ensure that PCB-containing building materials do not contaminate surrounding surfaces. *See* Ex. 17, EPA, *Practical Actions for Reducing Exposures to PCBs in Schools and Other Buildings* (July 28, 2015).

³⁵ Port District Code § 10.03(d).

³⁶ *See, e.g.,* Ex. 10, Spokane River Regional Toxics Task Force, *Comprehensive Plan to Reduce Polychlorinated Biphenyls (PCBs) into the Spokane River*, at 61 (Nov. 29, 2016).

to fail, to implement and enforce any program to inspect, identify, remove and exercise due care in construction, demolition and renovation activities, and in supervising construction, demolition and renovation activities of its lessees, which has resulted in ongoing discharges of pollutants into the bay in violation of applicable permits and the CWA.

In addition, Claimants are informed and believe that the Port District has long failed to maintain buildings it owns that are located in proximity to the Bay, and it has failed to adequately require that its lessees properly maintain their facilities. Specifically, the Port District owned and operated properties on the tidelands and at the airport that had paint containing PCBs, which were allowed to fall into disrepair during the Port District's operation of the property. The Port District, as the sole operator during such times, allowed PCB-containing paints to break down and discharge into the Bay.

For example, the Tow Basin property and buildings reverted to the Port District after its tenant's lease expired, and the property was then documented to be in a "very clean" and good condition.³⁷ After the Port District took sole control of the Tow Basin building, however, the Port allowed it to fall into disrepair, such that the operators of Sunroad Marina were complaining to the Port District about the "boarded up vacant and contaminated buildings" at the Tow Basin, which were supposed to have been demolished more than a decade earlier.³⁸ Similarly, in 1998, a report noted the "highly weathered and disturbed condition" of the Tow Basin facility.³⁹ Although the Port District had assumed responsibility from its former tenant to demolish and remove the Tow Basin facilities,⁴⁰ it failed to take any such actions, even though "deteriorating paint on the exterior walls of the Tow Basin building" was determined to be a source of PCB runoff to the Bay years prior.⁴¹ Sediment sampling in the vicinity of the Tow Basin before and after the Port District took exclusive control of the property also indicates that PCB levels increased during the Port District's tenure,⁴² a result of its failure to maintain the property.

Similarly, building materials such as paint, caulking, and joint compounds at the Port-leased TDY premises contributed to PCB discharges into the Bay, and the deterioration of those premises at the hands of the Port District, *after* its tenant's operations ceased, contributed to PCB

³⁷ Ex. 18, Phase I Environmental Assessment (Jan. 23, 1991), at 8.

³⁸ See Ex. 19, Letter from Scott Mac Laggan, Sunroad Marina to Michael VandenBergh, Port District (Mar. 26, 1997).

³⁹ See Ex. 20, PCB Source Investigation Report, CH2M, at 4-1 (Jan. 1998).

⁴⁰ See Ex. 21, Agreement for Amendment of Lease (May 17, 1983).

⁴¹ Ex. 20, PCB Source Investigation Report, CH2M, at 4-2 (Jan. 1998) (documenting weathering of Tow Basin building during the Port's period of ownership); Ex. 22, Risk Assessment Report, Ninyo & Moore (2000), at 18 (noting that "[a] likely source of . . . PCBs [in the Bay] is deteriorating paint on the exterior walls of the Tow Basin building").

⁴² Ex. 23, Work Plan for Implementation of Sediment Quality Objectives, Haley & Aldrich, Inc., at 4-6 (July 16, 2010).

discharges to the Bay.⁴³ In fact, the federal district court in the Southern District of California found that the level of contamination in the storm water systems near the TDY premises *increased* at a time when the Port District had full control of the abandoned property,⁴⁴ leading the court to conclude that “[i]t is a reasonable inference that the general deterioration and lack of maintenance of the property after TDY returned it to the Port District was a likely new source of PCB contamination.”⁴⁵ The Port District ultimately did not demolish the buildings or disconnect the MS4 until 2012, by which time significant discharges had not only reached the Bay, but also had threatened the efficacy of a PCB remediation/capping project that had previously been implemented by TDY.⁴⁶

In addition to failing to maintain buildings on its properties, the Port District also has failed to prevent active discharges from its properties. For example, although the Port District owned and operated the airport from approximately 1962 until 2002 (and continues to lease the property to the Airport Authority to this day), the Port District has consistently failed to prevent discharges of PCBs, and other pollutants, from the airport to the Bay.⁴⁷ In fact, the Regional Board has determined that “chemicals potentially associated with airport operations include aluminum, chromium, copper, lead, titanium, iron, zinc, and PAHs,” and that during the time the Port District was responsible for managing storm water discharges from the airport site (approximately 1997 to 2003), these and other pollutants such as contaminated sediment, jet fuel (PAHs), brake pad residuals (metals), and PCBs from building demolitions, were discharged from the airport site to the Bay through the Port District’s MS4.⁴⁸ The Regional Board further

⁴³ “[O]ngoing PCB contamination could have been reduced, if not eliminated, by the demolition and removal of the buildings and structures By allowing the Site to stand without maintenance for a number of years, PCB contaminated materials (dust, eroded particles, paint chips) continued to migrate into the storm drains and contaminate the [Bay].” *TDY Holdings, LLC v. United States*, 122 F. Supp. 3d 998, 1010 (S.D. Cal. 2015).

⁴⁴ *Id.*, at 1012.

⁴⁵ *Id.*

⁴⁶ In 1998, the Port District’s tenant, TDY, was forced to construct a sand cap over the Convair Lagoon to isolate bay sediments impacted with PCBs discharged from its premises. *See* Ex. 24, Regional Board CAO No. R9-2004-0258, Finding 8. In 2004, new PCBs were discovered on top of the cap, and the Regional Board issued a further CAO to TDY to clean up the PCBs that had since accumulated on top of the cap. *Id.* at Finding 4. The Regional Board later found that a key source of the PCBs that had accumulated on top of the cap were contaminated surface soils at the TDY site, which “were principally derived from the weathering of building materials (paint, joint compound, and concrete including slabs and foundations)” and transported to the Bay through the MS4. *See* Ex. 25, Regional Board Order No. R9-2015-0029, at Finding 5(b). The Southern District of California also found that the “general deterioration and lack of maintenance of the property after TDY returned it to the Port District was a likely new source of PCB contamination.” *TDY Holdings, LLC*, 122 F. Supp. 3d at 1012.

⁴⁷ Ex. 26, Regional Board Investigative Order No. R9-2014-0007, at 5.

⁴⁸ *Id.* at 5-6.

determined that the Port District discharged pollutants from its MS4 at levels that “could potentially cause pollution, contamination, and nuisance as defined in Water Code Section 13050[;] . . . could impair the beneficial uses of San Diego Bay and adversely impact . . . target receptors[;] [and could] . . . adversely affect public health and animal life, pollute bay sediments and cause a public nuisance particularly when discharged to areas with high public exposure.”⁴⁹

The Port District’s inadequate maintenance of buildings located on trust property and under its control, as well as its failure to prevent discharges of PCBs and other pollutants from its lessees, has resulted in past and ongoing discharges to the Bay in violation of the CWA, including discharges from point sources for which the Port District does not hold any applicable NPDES permit. *See, e.g., Ass’n to Protect Hammersley, Eld, and Totten Inlets*, 299 F.3d at 1012 n.4 (“[N]othing in the Act limits citizen suits to only those claims where the alleged polluter has obtained an NPDES permit and violated its terms. Suit may also be brought where a party proceeds to discharge pollutants from a point source without a required permit.”) (citation omitted). Despite having the authority to require its tenants to halt or lessen their discharges to the Bay, the Port District has repeatedly failed to exercise that authority.

Similarly, Claimants are also informed and believe that the Port District’s past and ongoing use of PCB-containing products, as well as its failure to adequately supervise its lessees and their past and ongoing use of PCB-containing products, has resulted in unpermitted discharges into the Bay. Those discharges are from point sources both regulated by the Port District’s NPDES permits and from point sources for which the Port District does not hold any NPDES permit. Such discharges, independently and in combination, violate the CWA.

IV. CONCLUSION

The Claimants believe this Notice Letter sufficiently states grounds for filing suit. Upon expiration of the 60-day notice period, the Claimants intend to amend their counterclaims in the Action to include a citizen enforcement action in federal court pursuant to Section 505(a) of the CWA for the above violations. In addition to the violations set forth above, this Notice Letter covers all violations of the CWA by the Port District evidenced by information that becomes available to the Claimants after the date hereof.

Pursuant to Section 309(d) of the CWA, 33 U.S.C. § 1319(d), and the Adjustment of Civil Monetary Penalties for Inflation, 40 C.F.R. § 19.4 (1997), each separate violation of the Clean Water Act subjects the violator to a penalty. These provisions of law authorize civil penalties of up to \$37,500 per day per violation for all CWA violations occurring after January 12, 2009. In addition to civil penalties, the Claimants may seek preliminary and permanent injunctive relief preventing further violations of the CWA pursuant to Sections 505(a) and (d), 33 U.S.C. § 1365(a) and (d), and such other relief as is permitted by law. Lastly, Section 505(d) of the Clean Water Act, 33 U.S.C. § 1365(d), permits prevailing parties to recover costs and fees.

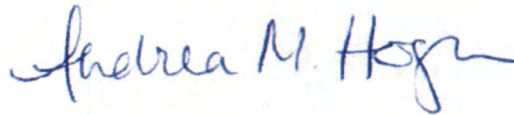
The Claimants have retained legal counsel to represent it in this matter. Please direct all communications to:

⁴⁹ *Id.* at 3.

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Very truly yours,

A handwritten signature in blue ink that reads "Andrea M. Hogan". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

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